

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
AT&T Corp. Petition for Declaratory	)	WC Docket No. 03-133
Ruling Regarding Enhanced Prepaid Calling	)	
Card Services	)	

**OPPOSITION OF THE UNITED STATES TELECOM ASSOCIATION TO  
MOTION FOR STAY PENDING APPEAL, SUBJECT TO POSTING OF SECURITY**

Pursuant to 47 C.F.R. §1.45(d), the United States Telecom Association (USTA) opposes the Motion for Stay Pending Appeal, Subject to Posting of Security filed by AT&T Corp. (AT&T) in the above-referenced docket. On February 23, 2005, the Federal Communications Commission (FCC or Commission) released an Order and Notice of Proposed Rulemaking (Order)<sup>1</sup> that denied a petition filed by AT&T in which it requested a “declaratory ruling that intrastate access charges do not apply to calls made using its so-called ‘enhanced’ prepaid calling cards when the calling card platform is located outside the state in which either the calling or the called party is located.”<sup>2</sup> In the Order, the Commission found that the “enhanced” calling card service described in the AT&T Petition is a telecommunications service, noting that the mere insertion of an advertising message in calls made with AT&T’s service does not alter the fundamental character of the service, which is a telecommunications service.<sup>3</sup> Having made that finding, the Commission directed AT&T to file revised FCC Forms 499-A with the Universal

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<sup>1</sup> See *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, Regulation of Prepaid Calling Card Services*, Order and Notice of Proposed Rulemaking, WC Docket Nos. 03-133 and 05-68 (rel. Feb. 23, 2005).

<sup>2</sup> See Order, ¶1, citing *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, Petition of AT&T, WC Docket No. 03-133 (filed May 15, 2003) (AT&T Petition).

<sup>3</sup> See Order, ¶¶14 and 21.

Service Administrative Company (USAC) in order to properly report prepaid calling card revenue and further so that USAC can calculate and assess the appropriate additional universal service contributions that AT&T should have made on revenues received from its prepaid calling card service.<sup>4</sup> In addition, the Commission found that as a telecommunications service, the jurisdiction of calls made using AT&T's prepaid calling card service is based on an end-to-end analysis such that AT&T's customers are subject to intrastate access charges when calls originate and terminate in different local calling areas within the same state.<sup>5</sup>

### DISCUSSION

AT&T's request for a stay pending appeal, subject to posting of security, should be evaluated under the test set forth in *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958), which requires a party seeking a stay to make a "strong showing"<sup>6</sup> of: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay."<sup>7</sup> In addition, "[a] petitioner must satisfy each of these four tests in order for the

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<sup>4</sup> See Order, ¶31.

<sup>5</sup> See Order, ¶28.

<sup>6</sup> *Virginia Petroleum Jobbers Ass'n*, 259 F.2d at 925.

<sup>7</sup> *Station KDEW(AM)*, Memorandum Opinion and Order, 11 FCC Rcd 13683, 13685-86, ¶6 (1996); *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, 14 FCC Rcd 16511, 16515, ¶9 (1999).

Commission to grant a stay.”<sup>8</sup> AT&T has not made the requisite “strong showing,” that would justify a grant of the requested stay by the Commission.

**I. AT&T HAS NOT SHOWN ANY LIKELIHOOD OF SUCCESS ON THE MERITS.**

AT&T has little prospect of success on the merits, much less a likelihood of success. The Commission cites to more than adequate authority in the Communications Act of 1934, as amended, as well as to numerous previous decisions it has made as the basis and justification for its finding that AT&T’s prepaid calling card service is a telecommunications service that is subject to universal service contributions on interstate revenues derived from calls made using its service, and its finding that calls made using the service are not wholly interstate in nature, but rather may be intrastate calls, and thus subject to intrastate access charge payments.<sup>9</sup> Beyond that authority, the Commission also considered arguments suggested by AT&T as dispositive and rejected them as distinguishable, misplaced, inconsistent, and inapposite.<sup>10</sup> Despite AT&T’s claims, the Commission has not misrepresented its earlier holdings nor has it departed from its precedents.<sup>11</sup> The Commission did not agree with the arguments made by AT&T when it filed its Petition or in AT&T’s numerous *ex parte* communications to the Commission and AT&T has presented no reason in its Motion for Stay for the Commission to reverse its decision.

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<sup>8</sup> *Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of Wholesale Cellular Service Providers in the State of Connecticut*, 11 FCC Rcd 848, 853, ¶14 (1995).

<sup>9</sup> See Order, ¶¶14-16, 22, and 28.

<sup>10</sup> See Order, ¶¶17-20 and 24-25.

<sup>11</sup> See AT&T Petition at 12.

**II. OTHER PARTIES WILL BE HARMED IF THE COMMISSION GRANTS THE REQUESTED STAY.**

If the Commission grants the requested stay, the money that is not paid into the Universal Service Fund (USF or Fund) by AT&T, now that the Commission has directed AT&T to file amended Forms 499-A and directed USAC to calculate revised contributions and to issue revised invoices, will result in the USF contribution factor being higher than it should be. A higher contribution factor means that all carriers that contribute to USF will be paying more into the Fund than is necessary or required and these carriers will be harmed if the Commission grants the requested stay.

Other parties will also be harmed by a Commission grant of stay. AT&T acknowledges that “it is quite likely that numerous incumbent telephone carriers will sue AT&T to collect intrastate access charges from AT&T for its EPPC services,”<sup>12</sup> and notes that at least one incumbent local exchange carrier has already brought an action to recover intrastate access charges.<sup>13</sup> AT&T’s claim that such litigation may be unnecessary and wasteful if the Commission’s Order is vacated on appeal<sup>14</sup> is irrelevant with regard to whether it has made the necessary showing of whether there is any prospect of harm that may be experienced by others if a stay is granted. Any carrier that decides to bring a claim in state court or before a state regulatory agency must assess the value of initiating and prosecuting a claim, knowing that the basis for the claim could be overturned on appeal. Each carrier contemplating such a claim should be permitted to make that assessment. Similarly, no carrier should be precluded from moving forward with a state claim, particularly since AT&T has made no offer to secure a letter

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<sup>12</sup> AT&T Petition at 25.

<sup>13</sup> See AT&T Petition at 24.

<sup>14</sup> *Id.*

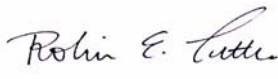
of credit, or to make some similar assurance, that would cover the amount of any intrastate access liabilities that are presumed to be owed based on the Commission's finding that calls made using AT&T's service are intrastate in nature when they originate and terminate in different local calling areas, but within the same state. If the Commission grants the requested stay, and if AT&T is correct in its claim that the "practical effect of a stay pending appeal will be that stays will be entered in such private suits,"<sup>15</sup> then carriers that have a basis and right to bring private suits in state courts will be harmed by the delay in their cases.

### CONCLUSION

The Commission should deny AT&T's Motion for Stay Pending Appeal, Subject to Posting of Security. AT&T has not demonstrated a strong likelihood that it will prevail on the merits on appeal. Equally important, a grant of stay would result in harm to other parties.

Respectfully submitted,

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April 4, 2005

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<sup>15</sup> AT&T Petition at 24.

## **CERTIFICATE OF SERVICE**

I, Meena Joshi, do certify that on April 4, 2005, the aforementioned Opposition of The United States Telecom Association to Motion for Stay Pending Appeal, Subject to Posting of Security was electronically filed with the Commission through its Electronic Comment Filing System, was sent via e-mail to Best Copy at the address listed below, and was served on all parties by mailing, postage prepaid to their addresses listed on the service list below.

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